

No. 10937

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the  
Northern District of California, and FRANCIS  
BIDDLE, Attorney General of the United  
States,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,

Southern Division

FEB 15 1945

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Respondent and Appellee

In the District Court of the United States for the  
Northern District of California, Southern  
Division

No. 23720 S Civil

EXHIBIT 1

In the Matter of the Petition of

JACK W. BAGLEY,

for a Writ of Habeas Corpus.

JACK W. BAGLEY,

Petitioner,

vs.

GEORGE VICE, United States Marshal for the  
Northern District of California, and FRAN-  
CIS BIDDLE, Attorney General of the United  
States

Respondents.

PETITION FOR WRIT OF  
HABEAS CORPUS

To the District Court of the United States, North-  
ern District of California:

Comes now Jack W. Bagley, hereinafter referred  
to as Petitioner, and files this petition for a writ  
of habeas corpus on behalf of himself and respect-  
fully represents:

1. The petitioner is a citizen of the United  
States and a resident and citizen of the State of  
California.

2. Petitioner is now in custody of and illegally  
deprived of his liberty by respondents in San Fran-



cisco, California in the Northern District of California. The respondent Vice is the United States Marshal in said district and the respondent Biddle is the Attorney General of the United States to whose custody petitioner was committed. [1\*]

3. The cause or pretense of such illegal imprisonment and restraint of petitioner is a judgment rendered and entered on September 29, 1943 in the District Court of the United States for the Northern District of California in a certain numbered cause on the Docket of said Court, No. 28056-R, whereby petitioner was convicted on verdict of guilty of the offense charged, to-wit: violation of Section 11 of the Selective Training and Service Act of 1940, as amended, 50 U.S.C.A. Section 311, in that petitioner "did, on or about July 17, 1943, in Redwood City, California, having heretofore been classified in I-A and then and there knowingly and feloniously fail to comply with the order of his said local board No. 106 to report for induction into the Land or Naval forces of the United States" and thereupon was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years. No fine or costs were imposed upon petitioner in said judgment. Thereafter said judgment was affirmed by the Ninth Circuit Court of Appeals on June 14, 1944.

4. The judgment and commitment are void and the order of said Local Board in turn, was void

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

because the petitioner was denied his due process of law and the Selective Service Agencies violated the Selective Service Regulations as will appear hereinafter in detail:

First. The Local Draft Board classified petitioner ~~without~~ considering the written evidence actually submitted by him.

Second. The Local Draft Board did not accord the petitioner the right to a personal appearance in that the petitioner was not given an opportunity to present his case supporting his claim for a classification as a conscientious Objector. [2]

Third. The petitioner was not accorded an opportunity to present his claim before the Hearing Officer and was not given an opportunity to meet, nor was he advised, of any adverse evidence against him; that the Hearing Officer refused to inform the petitioner as to the general nature and character of any evidence unfavorable to him; that the Hearing Officer misled the petitioner by advising him that there was no evidence against him after which the Hearing Officer based his adverse ruling upon evidence which he had notwithstanding his statement to the petitioner.

#### I.

Your petitioner duly registered under the Selective Training and Service Act of 1940, on February 15, 1943 with Local Board No. 106, in Redwood City, California. On August 14, 1942 petitioner filed his verified Selective Service Questionnaire, D.D.S. Form 40, with said Board. He declared

therein that by religious training and belief he was conscientiously opposed to war in any form and for that reason requested special form for Conscientious Objectors, Form 47. Thereafter, on August 27, 1942 petitioner filed with Local Board No. 106, D.D.S. Form 47, special form for conscientious objectors, claiming exemption from combatant and non-combatant Naval and Land Forces on the ground that he is a conscientious objector.

Despite ~~the~~ petitioner's claim to exemption from such service, on October 8, 1942, said Board classified petitioner I-A as available for general military or naval service. Petitioner wrote said Board requesting a personal appearance and advised the Board that he wanted to appeal from the I-A classification. On October 5, 1942 petitioner appeared [3] before the Board for what it termed (on its minutes) an "appeal", but was not given the opportunity, then or thereafter, to present any evidence to the Board. Said Board violated Selective Service Regulations Sec. 625.1 and Section 625.2 in that he was not given a personal hearing such as said regulations required.

Said Regulations are attached to this Petition, made part hereof by reference and marked Exhibit "A".

Thereafter, petitioner was advised that the said Appeal Board, on May 26, 1943, affirmed the said I-A classification of Petitioner and thereafter, on July 3, 1943, Local Board No. 106 sent petitioner an order to report for induction into the Land and Naval Forces of the United States on July 17, 1943.

On July 16, 1943 petitioner wrote and sent to said Board a letter protesting his I-A classification and again asking for a IV-E classification. Petitioner did not comply with the July 3rd order to report for induction, for the reason that his conscientious beliefs would not permit him so to do; and for the reason that said order was null and void.

## II.

Petitioner alleges that his local draft board denied him due process of law, and violated the Regulations of the Selective Service System in that said board made a determination of his classification, classifying him I-A instead of his rightful IV-E, without considering the evidence submitted by him; said action of the Board being in violation of Selective Service Regulation 623.2. Said regulation provides that the Board must make a classification solely on the written information contained in the registrant's file.

The evidence submitted by him was his conscientious objector's questionnaire (D.D.S. No. 47) filed with the Board on August 27, 1942 as heretofore set forth and also a document labelled "Supplementary Information for Form No. 47." [4]

## III.

The Notice to petitioner dated March 11, 1943, of the Hearing held on March 23, 1943 by the Officer of the Department of Justice advised petitioner (conforming to Department Instructions) that he had a right to present any pertinent evidence in

support of his claim and further advised him that at the hearing, upon his request, he would be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the prior investigation which was unfavorable to or tending to defeat his claim for exemption as a conscientious objector; and that he would be afforded an opportunity to explain or rebut such evidence. The aforementioned notice stated:

“4. At the hearing, the registrant, at his request will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence.”

However, the Hearing Officer's questions of the petitioner were few and perfunctory and when the Hearing Officer was asked if there was any evidence against the petitioner the Hearing Officer replied that there was none. Nonetheless, the Hearing Officer's files, at the time of the hearing (as the petitioner later learned) actually contained considerable evidence that reflected adversely on the patriotism and sincerity of the petitioner and contained as well reflections on his character by attacks on his school and work record and the petitioner was misled with respect thereto by the Hearing Officer. Petitioner did not know of the existence of the reports against him in the [5] possession of the Hear-



ing Officer until he made an appeal to the President by writing to General Lewis B. Hershey. Petitioner never had an opportunity to make his denials and explanations to the Hearing Officer.

Petitioner alleges said Hearing Officer violated the right of the petitioner to know the source of information adverse to the petitioner as required by due process of law and by the instructions of the Attorney General to Hearing Officers, as follows:

Department of Justices' Memorandum to Hearing Officers Appointed Pursuant to Sec. 5 (g) Selective Training and Service Act of 1940:

"A clear and succinct statement of the facts which will apprise the registrant of the objections raised to granting his <sup>aim</sup> ~~claim~~ is sufficient. However, no Hearing Officer should make any finding of facts detrimental to the registrant which is based upon information, the source of which is not disclosed to the registrant."

Petitioner alleges the report of the Hearing Officer is based on false evidence in the following particulars:

1. It states that petitioner was expelled from Sequoia Union High School.

That is not true. When visited by his mother the Dean of said High School advised that petitioner could return to school the next day.

2. It states that petitioner was only interested

in his own welfare and had only taken these steps for self-preservation. That is not true because petitioner had put every cent he could spare into "Mankind United", a religious organization, to promote peace, because of petitioner's belief in humanity.

3. It was stated that petitioner never expressed any religious inclinations or objections to war. That [6] is not true. Petitioner has always talked against war.

4. It states that one of the persons who signed his name as a reference on Form 47, did so under extreme pressure, with great misgivings. That is not true because this person signed willingly and has always taken a kindly interest in petitioner.

5. It was stated that because petitioner worked in a shipyard petitioner could not be conscientious. By working in a shipyard, petitioner was enabled to increase his support of "Mankind United."

On or about the 17th day of July, 1943 (the date he was to report for induction) the petitioner mistook the law and his rights and duties thereunder with respect to reporting for induction and understood, was of the belief, and had been advised that upon reporting to his local Draft Board as directed so to do by the order of induction, he thereby voluntarily surrendered to and became a part of the Armed Forces of the United States. The petitioner, as a conscientious objector, was unable to thus surrender to the United States Army and become a part thereof.

The petitioner did not discover until on or about May 15, 1944 that by reason of a Supreme Court

decision a registrant under the Selective Training and Service Act, ordered to report for induction does not become a member of the Armed Forces until and unless he takes the oath administered to the inductees.

The petitioner is willing at this time to comply with the order to report for induction heretofore issued by his local Draft Board, or any new order to report for induction which may be issued by his local Draft Board up to the point of actually becoming a member of the United States Army; and the petitioner is willing to take any other steps, up to said point of submission to said United States Army, so far as [7] are now known to the petitioner, which he may be ordered to take, short of and other than, such actual submission to said Army.

The petitioner is willing to take such steps in order to exhaust all administrative steps and procedures in order to secure a judicial review of the action of the Selective Service Agencies which said action the petitioner has claimed, and believes, to be in violation of his rights to due process of law, and in violation, by said Selective Service Agencies, of both the constitutional rights of petitioner and the Selective Training and Service Act and Regulations adopted pursuant thereto.

Had the petitioner, on or about July 17, 1943, known or been advised that reporting as directed by his local Draft Board, without taking the oath, would have continued civil, as distinguished from military jurisdiction over the petitioner, and had the petitioner known or been advised that such a



report on his part to the place directed in said order was necessary in order to secure a judicial review of the arbitrary action of the Selective Service Agencies, the petitioner would have so reported.

The petitioner is not held by virtue of any complaint, indictment, presentment, warrant, or quarantine law, rule, regulation, arrest or order, except as above specifically set forth. No application for a writ of habeas corpus has been made by or in behalf of said prisoner in regard to said restraint, or at all, except the petition herein.

Wherefore, your petitioner prays that an order be granted directing the respondents to have said Jack W. Bagley before said Court at a time and place therein to be specified, to do and receive what shall then and there be considered by said Court, concerning the petitioner so restrained, together with the time and cause of his detention, and said Writ; and that he may be restored to his liberty. And the [8] petitioner prays for such other relief as to the Court may seem just.

A. L. WIRIN and

J. B. TIETZ

Attorneys for Petitioner.

### ORDER

Let a Writ of Habeas Corpus issue, returnable on ..... The Petitioner may be released on bail, on the Writ, in the sum of \$. . . . .

.....

United States District Judge.

[9]

## EXHIBIT "A"

## Selective Service Regulations, Sec. 625.2

"(a) At any such appearance the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as, he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(b) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification." [10]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN BEHALF  
OF PETITION FOR A WRIT OF HABEAS  
CORPUS

A Writ of Habeas Corpus will issue prior to induction, after conviction on a criminal charge to inquire into the denial of due process by Selective Service Agencies.

Bagley v. United States, Ninth CCA No. 10574,  
decided June 14, 1944.

Respectfully submitted,

J. B. TIETZ

Attorney for Petitioner. [11]

State of California,  
County of Los Angeles—ss.

Jack W. Bagley being by me first duly sworn, deposes and says: that he is the Petitioner in the above entitled action; that he has read the foregoing Petition and knows the contents thereof: and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JACK W. BAGLEY

Subscribed and sworn to before me this 25th day  
of September, 1944.

EDWARD A. MITCHELL

City and County of San Fran-  
cisco, State of California.

Received copy of the within Petition and Points and Authorities this 25th day of September, 1944.

FRANK J. HENNESSY

Attorney for Respondents.

[Endorsed]: Filed Sep. 25, 1944. [12]

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[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein:

It Is Hereby Ordered that George Vice, United States Marshal for the Northern District of California, and Francis Biddle, Attorney General of the United States, or his representative, appear before this Court on the 3rd day of October, 1944, at the hour of 10 o'clock A. M., of said day, to show cause, if any they have, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Marshal for the Northern District of California and the Attorney General of the United States or his representative, the United States Attorney for this District, said copy of order to be mailed.

Dated: September 25, 1944.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Sep. 26, 1944. [13]

[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR  
WRIT OF HABEAS CORPUS

Comes now George Vice, United States Marshal for the Northern District of California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and moves the Honorable Court to dismiss the petition for writ of habeas corpus in the above-entitled case on the ground that the same is insufficient on its face to justify the issuance of a writ of habeas corpus or any other process.

Dated: September 30, 1944.

FRANK J. HENNESSY

United States Attorney,

JOSEPH KARESH

Asst. United States Attorney,  
Attorneys for Respondent.

George Vice [14]

RESPONDENT'S MEMORANDUM IN SUP-  
PORT OF MOTION TO DISMISS PETI-  
TION FOR WRIT OF HABEAS CORPUS

The petitioner, convicted of violating the Selective Training and Service Act of 1940, 50 USCA Section 311, which conviction was affirmed by the Circuit Court of Appeals for the Ninth Circuit, seeks to have his Selective Service classification re-

viewed by means of a writ of habeas corpus while in the custody of the United States Marshal for the Northern District of California, into whose custody he has just surrendered himself.

This precise issue was considered adversely to the petitioners in the cases of

United States ex rel Falbo vs. Kennedy, and  
United States ex rel Lohrberg vs. Nicholson,  
CCA-4, 141 F. (2d) 689, certiorari denied by  
the Supreme Court of the United States on  
May 22, 1944.

In its decision the Court held that the petitioners were imprisoned "not under the Selective Service Act but under the judgment of a Court" and that the judgment could not be collaterally attacked by a resort to habeas corpus.

Relying upon the decision in the above-entitled cases, the respondent respectfully rests his argument, believing that these cases should prevail as against the dictum found in the case of Bagley vs. United States, cited by petitioner.

In denying certiorari the supreme Court of the United States seems to have agreed with the Fourth Circuit. The respondent respectfully requests this Honorable Court to likewise concur in the above decisions.

[Endorsed]: Filed Sep. 30, 1944. [15]



[Title of District Court and Cause.]

MEMORANDUM AND ORDER DISMISSING  
PETITION FOR WRIT OF HABEAS CORPUS

Petitioner was convicted in this court (Case No. 28056-R) under an indictment charging violation of the Selective Service Act of 1940. Thereafter he was committed to the Attorney General of the United States for imprisonment for a term of two years. An appeal was taken and the judgment of this court was affirmed by the Circuit Court of Appeals for the Ninth Circuit on June 14, 1944 (No. 10574). Petitioner surrendered himself into the custody of the United States Marshal of this district under said judgment and commitment, and he now seeks a writ of habeas corpus, alleging that he is deprived of his liberty, upon the ground that he was denied due process of law by the local draft board when it refused his request for a personal appearance as provided by the Selective Service Regulations.

Respondents move to dismiss upon the ground that the petition on its face is insufficient to justify the issuance of the writ.

It appears from the record on appeal and the decision of the Circuit Court of Appeals, that the question as to petitioner's personal appearance and hearing before the local draft board was considered and determined. "It is clear that the judgment which was there upheld cannot be collaterally attacked on the same grounds by resort to habeas corpus." *U.S. v. Nicholson* and *U.S. v. Kennedy*, 141 F. (2d) 689. As was said in those cases petitioner

“is imprisoned, not under the Selective Service Act, but under the judgment of a court.” it is therefore [16]

Ordered, the petition for a writ of habeas corpus is dismissed and the order to show cause discharged.

Dated: October 3, 1944.

A. F. St. SURE

United States District Judge

[Endorsed]: Filed Oct. 3, 1944. [17]

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District Court of the United States

Northern District of California

Southern Division

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and forty-four.

Present: the Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

No. 23720-S Civil

This matter being submitted to the Court for consideration and decision, and the same now being fully considered, it is Ordered that the petition for a writ of habeas corpus be dismissed, and that the order to show cause be discharged in accordance with a memorandum and order this day signed and filed. [18]



[Title of District Court and Cause.]

NOTICE OF APPEAL

To Frank J. Hennessy, United States Attorney, and  
Joseph Karesh, Assistant United States At-  
torney:

Notice Is Hereby Given, that the petitioner above  
named, hereby appeals to the Ninth Circuit Court  
of Appeals from the Order of October 3, 1944, deny-  
ing the petition for Writ of Habeas Corpus and dis-  
charging the Order To Show Cause.

A. L. WIRIN and J. B. TIETZ

By J. B. TIETZ

Attorneys for Petitioner

[Endorsed]: Filed Nov. 8, 1944. [19]

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[Title of District Court and Cause.]

APPLICATION FOR RELEASE ON BAIL  
PENDING APPEAL

To the Honorable *J. F. T.* St. Sure, Judge of the  
Above Entitled Court:

The petitioner, having heretofore filed his notice  
of appeal, hereby applies for an order of Court re-  
leasing him on bail pending the appeal.

A. L. WIRIN and J. B. TIETZ

By A. L. WIRIN

Attorneys for Petitioner

[Endorsed]: Filed Nov. 30, 1944. [20]

[Title of District Court and Cause.]

ORDER DENYING APPLICATION FOR RE-  
LEASE ON BAIL PENDING APPEAL

Ordered:

Petitioner's application for an order of Court releasing him on bail pending the appeal of the above-entitled matter is denied.

Dated: November 30, 1944.

A. F. St. SURE

United States District Judge

[Endorsed]: Filed Nov. 30, 1944. [21]

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[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court Above Named:

You will please prepare, pursuant to Rule 75, Federal Rules of Civil Procedure and particularly Rule 75(j), a transcript of the following, and cause the same to be delivered directly to the Clerk of the Circuit Court of Appeals for the Ninth Circuit:

1. Petition for Writ of Habeas Corpus
2. Motion to Dismiss Petition for Writ of Habeas Corpus
3. Order to Show Cause
4. Motion for Order Dismissing Petition for Writ of Habeas Corpus
5. Application for release on bail, pending appeal

6. Order of the Court upon said application
7. Affidavit of Service, if any, upon respondents
8. All Minute Orders of the Court
9. Notice of Appeal.

A. L. WIRIN and J. B. TIETZ

By A. L. WIRIN

Attorneys for Petitioner and  
Appellant

[Endorsed]: Filed Nov. 30, 1944. [22]

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District Court of the United States  
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 22 pages, numbered from 1 to 22, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Jack W. Bagley, Petitioner, vs. George Vice, United States Marshal for the Northern District of California, and Francis Biddle, Attorney General of the United States Respondents, No. 23720 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$6.50 and that the said sum has been paid to me by the Attorney for the appellant herein.

personal appearance before his local draft board, when petitioner had previously been convicted on a Selective Service charge and said conviction had been affirmed by the Circuit Court of Appeals.

4. The District Court erred in holding it could not consider whether or not a petitioner for a Writ of Habeas Corpus had been accorded an opportunity to present his claim to a certain classification before the Hearing Officer; and the District Court erred in holding it could not consider whether or not he had been given an opportunity to meet adverse evidence nor whether or not the Hearing Officer misled him by advising him there was no adverse evidence against him, when petitioner had previously been convicted on a Selective Service Charge and said conviction had been affirmed by the Circuit Court of Appeals.

Dated January 18, 1945.

A. L. WIRIN and J. B. TIETZ

By J. B. TIETZ

Attorneys for Appellant

(Affidavit of service by mail attached.)

[Endorsed]: Filed January 30, 1945. Paul P. O'Brien, Clerk.